United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

893

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,887

ROBERT WILSON

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

JOSEPH S. McCARTHY
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Washington, D. C. 20006

ATTORNEY FOR APPELLANT
(Appointed by this Court)

July 14, 1967

STATEMENT OF QUESTION PRESENTED

Where it is uncontroverted that Appellant had permanent retrograde amnesia as a result of which he had no recollection of any of the events alleged in his indictment, proved at his trial, and for which he was convicted, was Appellant denied due process of law and of right to counsel?

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IN THE
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No. 20,887

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for violations of Title 22, §§ 2901, 501, D. C. Code (1961 ed.) (robbery, assault with a dangerous weapon). The Appellant was indicted January 25, 1965, on his plea of not guilty. He was tried before the United States District Court for the District of Columbia without a jury on Counts 5, 6, 7, 8, and 9 of the indictment. Findings of fact and conclusions of law were filed February 13, 1967; and judgment of conviction was

entered and sentence imposed on February 20, 1967. Notice of appeal was filed February 27, 1967. Appellant was granted leave to proceed on appeal in this Court in forma pauperis by order of the District Court, dated March 17, 1967. Jurisdiction of this Court to review the judgment below is based on 28 U. S. C., § 1291.

STATEMENT OF FACTS

On the evening of October 2, 1964, two officers in a police cruiser received a message on their car radio at approximately 9:50 p.m. that there was a hold-up robbery at Chevy Chase Pharmacy, Connecticut Avenue and Chevy Chase Circle, N. W. The "lookout" indicated that the suspects were two Negro males in a stolen yellow Mustang (Tr. 70-71).*

The police officers subsequently observed a yellow Mustang traveling south on Connecticut Avenue occupied by two Negro males. The tag number of the automobile checked with a lookout for a stolen automobile they had previously received. The officers began to chase the yellow Mustang (Tr. 71-72).

The automobile being pursued picked up speed, and the police cruiser continued to follow it. As the Mustang

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* "Tr." refers to the transcript of the trial.

turned into Cathedral Avenue, the cruiser came upon it and found that the car had failed to make a curve and had hit some trees in Rock Creek Park (Tr. 72). The car was completely demolished (Tr. 72). One of the officers testifying at the trial identified the Appellant as one of the two Negro males who were lying on the road adjacent to the car and identified the second passenger as James T. Perry, who to the best of the officer's knowledge was dead (Tr. 23).

The Appellant was unconscious and appeared to be seriously injured (Tr. 73). Both of the occupants of the Mustang were taken to the hospital, and the Robbery Squad of the Metropolitan Police Department arrived to take over the investigation (Tr. 74).

At the scene of the accident the officer picked up a gun identified as the Government's Exhibit No. 3, which was located about twenty feet north of the car and lying in the middle of the street (Tr. 74-75). There was also money scattered on the street (Tr. 75-76).

Detective Sergeant Keahon testified that he went to the scene of the accident in question and found a yellow Mustang and several other officers there (Tr. 77). Detective Sergeant Keahon identified Government's Exhibit No. 1 as a hat picked

up at the scene of the robbery by one of the officers of the Robbery Squad, Exhibit No. 2, a sailor's hat recovered at the scene of the accident, and Exhibit No. 5, a silk stocking with two holes in it (Tr. 77-78). He also identified Government's Exhibits Nos. 4A, B, C, and D; a key chain, a D. C. Driver's Permit in the name of Gerald Fells, a Republican Party card in the name of Mr. Fells, and a Voter's Registration Record in the name of Mr. Fells (Tr. 79). These were recovered from the car. The officer also identified a bottle of Desbutal which was recovered from the automobile (Tr. 80).

Detective Sergeant Keahon testified that the automobile was completely demolished and that the engine was practically on the front seat of the automobile (Tr. 82). Detective Sergeant Keahon could not identify the Appellant except to say that he could not be sure, but he believed that the Appellant was lying on the east side of Cathedral Avenue when he arrived (Tr. 83).

The Appellant was indicted on January 25, 1965, and pleaded not guilty on February 5, 1965. On February 19, 1965, the District Court ordered Appellant to be committed to St. Elizabeth's Hospital for a mental examination. Under date of May 20, 1965, Dale Cameron, M. D., Superintendent of St.

Elizabeth's Hospital, wrote the United States District Court and stated that the Appellant had been examined by qualified psychiatrists and that it was concluded on the basis of such examinations that he was "without mental disorder, although we find him incompetent for trial." The letter stated that there were no symptoms of mental illness at the present time, but that Appellant was suffering from organic amnesia, resulting from the automobile injury received on October 2, 1964. The letter concluded that Appellant was not suffering from mental disease or defect, but that he was in fact incompetent to stand trial.

On June 22, 1965, a hearing was held before Judge McGuire on the question of Appellant's competency to stand trial. Dr. Mauris Platkin, a member of the staff of St. Elizabeth's Hospital, testified that the Appellant was involved in a very severe automobile accident from which he suffered amnesia for a period prior to the automobile accident, during the accident itself, and a period subsequent to it. Dr. Platkin characterized this as organic amnesia which resulted in the Appellant's inability to recall, discuss, or otherwise remember what happened on a certain given date (pp. 5-6)*. He testified that there was no evidence available that Appellant on October 2, 1964, was

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* Page references are to the hearing transcript.

suffering any kind of a mental illness or defect, but as a result of the accident on October 2, he had been rendered amnestic, or unable to recall what happened. For this reason it was felt that Appellant was not competent to stand trial (p. 6). Dr. Platkin testified that his clinical judgment was based on the fact that the amnesia stemmed from its organic beginning, namely the automobile accident (p. 8). Also, Appellant had suffered a severe concussion and was unconscious for a considerable period of time (p. 8). Dr. Platkin testified that Appellant's memory for immediate past events was satisfactory.

On the basis of the testimony of Dr. Platkin the Court found the Appellant incompetent to stand trial (p. 9).

Superintendent Cameron addressed a second letter, dated August 24, 1966, to the United States District Court concerning Appellant. The letter stated that the Appellant had been committed on February 23, 1965, to St. Elizabeth's Hospital and that he had been returned to the hospital following the competency hearing held in June of 1966. Subsequent examination of the patient revealed a continuation of the amnesia as well as a left-sided partial paralysis which the letter stated were believed to be the results of cerebral contusion and concussion sustained in the automobile accident of October 2, 1964. The

letter stated:

> "It is believed, moreover, that the amnesia is permanent, and that it does interfere with patient's ability to assist counsel in his own defense. However, the patient has a rational and realistic understanding of the charges against him based on information given him since his injury."

On July 27, 1966, Mauris Platkin of St. Elizabeth's Hospital wrote Appellant's counsel stating of Appellant that:

> "The retrograde amnesia, which is organic, still exists, and, in our opinion, is permanent. Tissues of the central nervous system, including the brain and spinal cord, do not repair themselves in terms of regeneration; therefore, there is no possibility of 'brain repair.'"
>
> "[Appellant] will not, in our opinion, be able to aid in his own defense in terms of remembering what happened to him on the day of the alleged offense; however, being without mental disorder, and understanding fully the charges against him, he can synthesize an accurate historical picture of what certainly must have happened. It is not for us to say whether he is competent from the legal point of view, however."

A second competency hearing was held September 27 and 28, 1966, before Judge McGuire. At the hearing Dr. Straty Economon of St. Elizabeth's Hospital testified that the Appellant had a rational understanding of the nature of the charges pending

against him (p. 14). He testified, however, that the Appellant sustained severe head injuries and had several brain operations and neuro-surgical procedures as a result of which he has a permanent organic amnesia which was both retrograde and anterograde (p. 15). Dr. Economon further testified that the amnesia extended back to several hours prior to the evening of October 2, 1964, more explicitly, to the afternoon of that day (p. 16). The last thing Appellant remembered was that he was visiting his girl friend's house, and beyond that he remembered nothing until he regained consciousness in the hospital (p. 16). The doctor testified that aside from the amnesia, Appellant's memory is ordinary and normal and that he has a rational understanding of what has happened to him and is able to communicate with his attorneys (pp. 17-18). He testified, as a psychiatrist, that Appellant was not incompetent to stand trial "because of any mental disease or defect," (Tr. 18).

On cross-examination the doctor testified that the Appellant would not be able to aid in his own defense in terms of remembering what happened to him on the date of the alleged offense and that the amnesia was permanent (pp. 20-21).

Dr. Economon further testified that the Appellant, after the accident, was transferred from the Washington Hospital Center

and then to D. C. General and that he was unconscious for approximately three weeks (p. 21). The doctor testified that Appellant was unable fully to extend his left forearm and that he has a mild left-sided paralysis or weakness on the left side of the body and some trouble with his speech. These physical injuries were a direct result of the brain injury he received in the accident (pp. 22-23). The doctor testified that Appellant received a very severe concussion, a skull fracture, and had damaged the blood vessels in the brain as a result of the accident.(Tr. 25).

Appellant had no independent recollection of the events for which he has been criminally charged and never will have, in the opinion of the doctor (p. 24). The doctor testified that Appellant was not feigning amnesia. He stated that he did not think it was a possibility (Tr. 28).

Following the hearing Judge McGuire issued a written opinion. He specifically found that Appellant was in full possession of his mental faculties, but had no memory of any events in which he participated on the afternoon of October 2, 1964; that the amnesia is permanent; and that the cause of the amnesia was a brain injury sustained in an accident subsequent to the time the offenses

charged in the indictment took place. The Court further found that while the Appellant had no independent recollection, he could construct a knowledge of what transpired on information given to him from other sources and that, except for the amnesia, Appellant was perfectly able to follow the proceedings against him and to discuss them with his attorney. The Court concluded that since there was no showing of the unavailability from sources extrinsic to the Appellant of substantially the same information his present independent recollection could provide if functioning, that the Appellant's motion to be adjudged incompetent to stand trial would be denied (Tr. p. 9).

On February 2, 1967, the case was called to trial. At the outset, counsel for Appellant made a motion to dismiss the indictment on the ground that he was unable properly to represent the Appellant by reason of the fact that the Appellant would be unable to assist counsel in cross-examination of Government witnesses and was otherwise unable to assist counsel in Appellant's own defense (Tr. 3-5).

The trial proceeded to the Court, Appellant having waived trial by jury. At the conclusion of the trial, the Court found that the Defendant was guilty on Counts 5, 6, 7, 8, and 9, the Government having severed Counts 1, 2, 3, and 4.

At the trial Gerald Fells testified that he owned a yellow Mustang automobile (Tr. 11). At approximately 9:00 p.m. on October 2, 1964, two men approached him when he was standing adjacent to his automobile and demanded the keys, after one of them had placed a pistol against Mr. Fells' forehead (Tr. 12-13). He gave them the keys; and, in addition, after a demand, gave them his wallet (Tr. 14-15). He described his two assailants as Negro males, both of whom were wearing hats and both of whom were holding handkerchiefs over their faces (Tr. 16). When asked to identify Appellant, Mr. Fells could only state, "The best I could say is that he closely resembles the tall man" (Tr. 17). He was never asked to identify the Appellant prior to the time of the trial (Tr. 21-22). His assailants drove off in his automobile.

Mr. Fells identified several Government exhibits; Exhibit 4, as his driver's license, which was taken from him at the time of the robbery; 4A, his membership card in the Republican Party; 4B, his D. C. Voter's Registration; and 4C, his car keys and house keys, all of which were taken from him at the time of the robbery (Tr. 24). On cross-examination the witness admitted that after two years and it being so dark at the time of the robbery, that he testified I "couldn't just say

he was one of them" because his face was pretty well-hidden (Tr. 28).

Jack A. Morse testified on behalf of the Government that he was employed in the Chevy Chase Pharmacy at 5636 Connecticut Avenue, on the evening of October 2, 1964 (Tr. 30). He testified that at approximately 9:30 or 9:35 p.m., two men entered the store and one pulled a stocking mask over his face and the other put a handkerchief over his face and pulled a revolver. At that time Dr. William Sapperstein, the pharmacist, was in the store (Tr. 31). One of the men produced a revolver and demanded money, and Mr. Morse gave it to them out of the cash register (Tr. 32). He was then told to go to the rear of the store where Dr. Sapperstein was. Upon demand, Dr. Sapperstein gave the two assailants the money in the second register and two bottles of Desbutal (Tr. 33). After taking the money from the register and from the wallets of the witness and Dr. Sapperstein, a man walked into the store and one of the hold-up men told the taller man to shoot him. The taller man fired one round but missed (Tr. 34-35). Morse identified the weapon as resembling the one pointed at him at the time of the robbery and also identified the bottles of Desbutal (Tr. 39-40). He then identified Appellant as one of the individuals who was present at the time

of the robbery and was in fact holding the weapon (Tr. 40-41). While Mr. Morse testified that the shorter of the two men had a stocking over his face, the police report showed that the taller of the two, Appellant, had the stocking over his face (Tr. 56-57).

Dr. Sapperstein testified concerning the robbery that he had placed approximately $300 in the paper bag as requested by the two men. He also testified that he had given the men Desbutal (Tr. 64). Dr. Sapperstein was unable to identify either of the assailants (Tr. 65).

The Government did not introduce any evidence as to whose fingerprints, if any, were on the gun found adjacent to the wrecked car. Nor did the Government introduce ballistics evidence to prove the bullet which lodged in the door jamb of the Chevy Chase Pharmacy was fired by the gun found adjacent to the wrecked car. This evidence would be significant since Mr. Morse identified Appellant and stated that it was he who was carrying the gun (Tr. 51).

STATEMENT OF POINTS

Appellant's total inability to remember the events of the alleged offense rendered him incompetent to stand trial and rendered his conviction a violation of the right to due process guaranteed by the Fifth Amendment and of the right to effective assistance of counsel guaranteed by the Sixth Amendment. He was effectively denied the following basic rights, exercise of which was especially crucial under the facts of this case:

A. He was unable to aid his attorney in the preparation of his defense, particularly by his inability to supply the facts which might support an alibi or any partial defense.

B. He was unable at trial to knowledgeably follow the evidence or to actively aid his attorney in directing cross-examination.

C. He was unable to testify on his own behalf.

SUMMARY OF ARGUMENT

Appellant's inability to remember the facts surrounding the alleged crime is a fatal defect in his competency to stand

trial. Without his memory he cannot adequately defend himself; and to convict him thus violates his right to due process as guaranteed by the Fifth Amendment.

Due process contemplates the direct participation of the accused in all phases of the proceedings against him. The defense is developed through a dialogue between the accused and his attorney--a dialogue which is the basis for the attorney's investigations and for his preparation of the best available defense or partial defense. Such a dialogue was impossible here, creating therefore a failure of due process and of the right to effective assistance of counsel, guaranteed by the Fifth and Sixth Amendments respectively.

At trial, accused must follow the evidence and actively discuss it with counsel, particularly to make cross-examination effective. That is impossible here, where Appellant inevitably sat mute, undergoing his trial as if in absentia.

Appellant's basic right to be heard, to tell his own story in his own way, is here also effectively foreclosed.

Appellant's total inability to relate any facts, including even those which would support a partial defense, renders his conviction here, in what is already a weak case for the Government, intolerable under the most basic concepts of fairness and due process.

ARGUMENT

Compelling Appellant to Stand Trial When He Was Suffering from Permanent Retrograde Amnesia Was a Denial of Due Process and a Violation of the Right to Counsel Guaranteed by the Constitution.

It is an uncontroverted fact that Appellant had no recollection of the events preceding and following the acts for which he was formally tried by the Court below. Absent such recollection, Appellant was not competent to stand trial.

The test of "competency" to stand trial was established by the Supreme Court as follows:

> "whether [the accused] . . . has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him" Dusky v. United States, 363 U. S. 402 (1960).

Construing the above quoted test in Dusky, this Court declared:

> "Subsumed under [the Dusky] formulation is the requirement that the defendant's memory and intellectual abilities, which are crucial to the construction and presentation of his defense, must not be substantially impaired by mental disorder." Hansford v. United States, 124 U. S. App. D. C., 387, 389; 265 F.2d 920, 922 (1966).

In this case, the stipulated fact of Appellant's permanent organic retrograde amnesia (Tr. p. 5), by its very nature, did not merely impair his ability to construct and to present his defense, but totally obliterated that ability. He could only sit idly by as the Government presented its case, being neither able to affirm nor to deny the evidence against him. In short, the trial was virtually a trial of Appellant in absentia, depriving Appellant of the basic process of law and of the right to counsel.

There can be no question that as a matter of law Appellant was incompetent to stand trial. In Hansford v. United States, supra, this Court held that impairment of memory caused by acute brain syndrome induced by narcotics use could render the defendant incompetent. 124 U. S. App. D. C. at 390. Withdrawal symptoms could have the same effect by preventing the defendant from discussing the evidence with counsel. 124 U. S. App. D. C. at 391.

In Sanders v. Allen, 69 App. D. C. 307, 100 F.2d 717 (1938), petitioner alleged in a habeas corpus proceeding that because she was under the influence of drugs at the time of her trial, she was unable to understand the proceedings "and to make her defense." This Court held that if the allegations were true, then petitioner's conviction should be reversed.

The Court stated: "The trial and conviction of a person mentally and physically incapable of making a defense violates certain immutable principles of justice which inhere in the very idea of free government. Powell v. Alabama, 287 U. S. 45." 69 App. D. C. at 310. See also Carter v. State, 198 Miss. 523, 21 So. 2d 404 (1945).

More than half a century ago, a Federal Circuit Court charged a jury that the defendant was incompetent to stand trial if his memory was impaired so that he could not testify intelligently and supply his counsel:

> "with all material facts bearing upon the criminal act charged against him and material to repel the criminating evidence, and has such poise of his faculties as well enable him to rationally and properly exercise all the rights which the law gives him in contesting a conviction." United States v. Chisolm, 149 Fed. 284, 287 (C. C. S. D. Ala. 1906).

The basic unfairness of requiring one suffering from amnesia to defend himself against a criminal charge was recognized in United States v. Sermon, 228 F. Supp. 972 (W. D. Mo. 1964).

> "And certainly no one in the 1960's would dream of putting a defendant suffering from established amnesia to trial for a crime of any sort." (p. 977)

Due process contemplates the direct participation of the accused at his own trial. An accused has the right to consult with counsel; and, conversely, counsel must confer with him. Hawk v. Olson, 326 U. S. 271 (1945). Such consultation, as this Court has suggested, must involve "such phases of a defense as a defendant usually assists in, such as accounts of the facts, names of witnesses, etc." Lyles v. United States, 103 U. S. App. D. C., 22; 254 F.2d 725, 729-730 (1957), cert. den., 356 U. S. 961 (1958). See also MacKenna v. Ellis, 382 F.2d 592, 603 (5th Cir. 1960), mod. 289 F.2d. 928, cert. den., 368 U. S. 877. The principal function that the accused can play at this point "is a full revelation of the facts within the knowledge of the defendant in areas which are in legitimate dispute." United States v. Sermon, supra, 288 F. Supp, 978.

These principles are basic to the adversary system of justice, and without them the guarantee of the Sixth Amendment that "[i]n all criminal prosecutions, the accused shall . . . have the assistance of Counsel for his defense" is meaningless. See State v. Swails, 223 La. 751, 66 So.2d 796, 800 (1953).

Obviously assistance of counsel does not cease with the commencement of the trial. It is of extreme importance that defendant be able to follow the evidence and discuss it

with counsel. Hansford v. United States, supra. Such consultation is absolutely necessary to enable counsel adequately to explore the facts on cross-examination and to impeach testimonial credibility.

A person accused of a crime has the right to "take the witness stand to testify on his own behalf." United States v. Sermon, 288 F. Supp. 977; United States v. Chisolm, 149 Fed. 287. Denial of that right is a denial of due process of law--"Whether the jury would have believed [the accused] is immaterial; he should have had the opportunity to present his version of the facts." United States v. Bentvena, 319 F. 2d 916, 942-944 (2d Cir. 1963). See also Poe v. United States, 233 F. Supp. 173 (D. D. C. 1964), aff'd. 122 U. S. App. D. C. 163; 352 F. 2d 639, (1965), and Wieter v. Settle, 193 F. Supp. 318 (W. D. Mo. 1961). Obviously, Appellant's permanent amnesia is an effective bar to his exercise of the constitutional right to testify in his own defense.

The Court below relies on several common law cases which purport to reject an amnesia defense. The most recent and typical of these cases, Commonwealth v. Price, 241 Pa. 396, 218 A. 2d 758 (1966), discusses at length only the question of whether amnesia at the time of trial affects sanity at the time

of the crime, concluding, of course, in the negative; but it virtually ignores the main issue: the effect of amnesia upon present competency to stand trial. Not only do these cases fail to discuss the issue which is central here; but, as the Court below recognizes, they are based largely on a fear that the amnesia presented therein was feigned. Here, however, the genuineness of Appellant's mental disorder is a stipulated fact and does not admit such a basis for decision.

The Court below relies heavily on State v. Severns, 184 Ka. 213, 336 P. 2d. 447 (1959), which does discuss amnesia as affecting present competency to stand trial. This case is readily distinguished by the fact that Appellant there had already been fully tried for the alleged crime while his memory was completely intact. It was only at the second trial that he raised an amnesia defense. He had already participated fully in the investigation and preparation of his defense and in the conduct of his trial; he had already testified fully on his own behalf. The Court there held that these prior activities in his own behalf, and the availability of the written record of them to refresh his memory, satisfied due process. The Kansas Court thus practically implied that such self-help is, in fact, essential to due process.

The Court below analogizes this case to that of a person who voluntarily renders himself so intoxicated that he is unable to recall his activities while intoxicated. The comparison is inapposite; the law has always distinguished between those who are voluntarily and those who are involuntarily incapacitated. See, e.g, Anno., 8 A. L. R. 3d 1236. A drinker intends to render himself intoxicated. Appellant here, if in fact he had any control over the driving of the auto of whose crash he was the sole survivor, certainly did not intend to render himself a partial amnesic and partial paralytic. The intention to escape the police, if Appellant himself had even this intention--he may have been held in the car against his will--did not become the intention to induce in himself a state of mental disorder. His condition is involuntary, total, and permanent, and manifestly renders him incompetent to perform those functions essential to a fair trial.

This case is an excellent example of why the knowledgeable participation of an accused is required for an effective defense. Because Appellant could not remember what occurred on the afternoon or evening of the day on which the alleged crimes occured, it is obvious that any alibi that he might have had could not be established. Further, any partial defense

based on nullification of the requisite intent to commit the crimes charged, by reason of intoxication, drug use, or other reasons must go unrevealed.

Additionally, the only direct identification of Appellant was by one witness made at night two years before trial under the emotional stress of an armed holdup and which identification was contradicted by the witness' contemporaneous statements to the police. Information which the defendant would normally have supplied as to the manner in which Appellant was dressed and as to other such factors absolutely essential to effective cross-examination of Government witnesses was unavailable. This type of assistance of counsel becomes even more essential where, as here, the Government has failed to adduce evidence of any fingerprints that may have been on the pistol or ballistic evidence tying the bullet fired at the drug store to the pistol found at the scene of the accident. The Government's failure to adduce any scientific evidence which might have turned a weak case into a conclusive one emphasizes the need of counsel for consultation as to the true facts.

It follows not only as a requirement of basic fairness, but also as the constitutionally protected rights of due process and assistance of counsel, that the conviction below cannot stand.

CONCLUSION

For the foregoing reasons, the verdict and judgment of the Court below should be reversed.

Respectfully submitted,

Joseph S. McCarthy
Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF FOR APPELLANT was mailed, postage prepaid this _____ day of June, 1967, to David Ellenhorn, Assistant United States Attorney, U. S. Court House, Washington, D. C.

Joseph S. McCarthy

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,887

ROBERT WILSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DAVID N. ELLENHORN,
THEODORE WEISEMAN,
Assistant United States Attorneys.

Cr. No. 46-65

QUESTION PRESENTED

Whether an accused suffering permanent amnesia about the circumstances surrounding the offense, but who has no mental disease or defect, is mentally competent to stand trial?

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TABLE OF CASES

OTHER REFERENCES

*Authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

20,887

ROBERT WILSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE [1]

On February 2, 1967, the Honorable Joseph C. McGarraghy, sitting without a jury, found appellant guilty of robbery and assault with a pistol (22 D.C. Code §§ 2901 and 502), as charged in five counts of a nine-count indictment, the remaining four counts having been

[1] In this brief "T.Tr." refers to the transcript of the trial and "H.Tr. (2)" to the complete 34 page transcript of the second mental competency hearing on September 27 and 28, 1966. The brief makes no reference to the other two transcripts in the record —the first competency hearing on June 22, 1965, and the incomplete 29 page transcript of the second competency hearing.

severed before trial on motion of the government. Appellant was sentenced to serve a term of five to fifteen years' imprisonment on the counts charging robbery (Numbers 5, 7, and 8) and a term of three to nine years' imprisonment on the counts charging assault (Numbers 6 and 9), the two sentences running concurrently.

Evidence of Guilt

The testimony at trial showed that about 9 p.m. on October 2, 1964, in the 900 block of Jefferson Street, Northwest, Mr. Gerald A. Fells had parked his car and was walking along the street when two men ran up and held him up with a pistol, which was carried by the taller of the two robbers. The short robber did not have a weapon. After going through Mr. Fell's wallet and taking his car keys, the robbers got into his car and ordered him to do the same. When Mr. Fells refused to get into the car, the tall robber pointed the pistol out the window and threatened, "If you don't get in, I'll blow your * * *[2] head off." Mr. Fells turned his back and walked away. He heard the hammer of the gun and the short robber say, "No, don't shoot him, the police are around the corner." Then the robbers drove away in Mr. Fell's car. Since the robbers held handkerchieves up to their faces, Mr. Fells was unable to make a positive identification, but he did testify at trial that appellant "closely resembles" the tall robber, the one who used the pistol. (T.Tr. 10-17).

A short time later, sometime between 9:00 and 9:30 p.m., two men held up the Chevy Chase Pharmacy, 5636 Connecticut Avenue, Northwest. The tall robber held a handkerchief to his face and carried a pistol, while the short one wore a stocking mask and did not have a gun. The robbers took over $400 in cash and three bottles of a drug named desputal. During the robbery, a prospective customer happened to walk in the pharmacy, and on

[2] Obscenity omitted.

seeing what was happening, turned around and started out the front door. The short robber hollered, "shoot the mother * * *,[3]" and the tall robber fired at the running figure, the bullet missing and landing in the door jamb. An employee of the pharmacy positively identified appellant as the tall robber who used the pistol. (T.Tr. 29-36, 40-41, 50, 60-67).

A short time after the second robbery, about 9:50 p.m., two police officers in a scout car saw Mr. Fells's car driving south on Connecticut Avenue. Having heard the report that it was stolen, the officers pursued the car. There was a high-speed chase through Rock Creek Park, which ended when Mr. Fells's car missed a curve, ran off the road, and crashed in the trees. The officers took two men from the wreckage—James T. Perry, who was dead, and appellant, who was unconscious. Found at the scene, either inside the wreckage or lying close by, were the following: money (bills scattered all around the scene); a pistol that, according to the witnesses at trial, resembled the one used in the two robberies; two hats similar to the ones worn by the robbers; a stocking mask, a bottle of desputal from the Chevy Chase Pharmacy; and Mr. Fells's keys, his driver's license, his voter registration card, and his Republican Party membership card. (T.Tr. 21-24, 37-40, 67-68, 70-75, 78-80, 84).

Mental Competency to Stand Trial

The automobile accident left appellant unconscious for some three weeks, fractured his skull, gave him a severe concussion, and ruptured several blood vessels in his brain. As a result, appellant has a partial paralysis on his left side, a slight speech impediment, and permanent amnesia. He cannot remember anything between the afternoon of October 2, 1964, the day of the robberies, and three weeks later when he regained consciousness. There is no hope that he will ever recover his memory. Except

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[3] Obscenity omitted.

for this three week memory loss, appellant's mental condition is normal. He suffers from no mental disease or defect. There is no reason, therapeutic or otherwise, for his being in a mental hospital. (H.Tr. (2) 15-18, 20-28).

Appellant was committed to Saint Elizabeths Hospital for a mental examination on February 23, 1965. Originally, the hospital reported that although appellant suffered from no mental disorder, his amnesia rendered him incompetent to stand trial (see letter from Saint Elizabeths Hospital dated May 20, 1965). On the basis of that report, the Honorable Matthew F. McGuire held a competency hearing and committed appellant to the hospital on June 22, 1965, as incompetent to stand trial. Appellant remained in the hospital for fourteen months, until the hospital reevaluated its position in a letter dated August 24, 1966. The letter advised the court below:

> In view of the fact that it is our opinion that the patient is not suffering from a mental disease or disorder at this time, and that he probably was not suffering from such a disorder on or about October 2, 1964, it is recommended that the Court make appropriate disposition of his case. In view of the fact that we believe him not to be suffering from mental disease or defect, there would seem to be little merit in continuing his hospitalization at this Hospital. He is not receiving medication, and enjoys good health within the limits outlined above.

Accordingly, Judge McGuire held a second competency hearing on September 27 and 28, 1966, at which he heard testimony from a staff psychiatrist at the hospital. Appellant took the position at the hearing that he was incompetent to stand trial. On November 25, 1966, Judge McGuire filed a ten-page memorandum opinion finding appellant mentally competent to stand trial. The opinion held that (p. 8):

> amnesia per se in a case where recollection was present during the time of the alleged offenses and where

> defendant has the ability to construct a knowledge of what happened from other sources and where he has the present ability to follow the course of the proceedings against him and discuss them rationally with his attorney does not constitute incompetency per se, and that a loss of memory should bar prosecution only when its presence would in fact be crucial to the construction and presentation of a defense and hence essential to the fairness and accuracy of the proceedings.

Judge McGuire went on to state (p. 9):

> The Court concludes, therefore, from an examination of the authorities cited, that the rule to be applied in this case is whether insufficient information concerning the events at the time of the commission of the crime and evidence relating thereto is available to the defense so that it can be said that the presence of such an amnesia as we have here precipitates a situation in which defendant's memory is indeed a faculty crucial to the construction and presentation of his defense. Accordingly, since there has been no showing of the unavailability from sources extrinsic to the defendant of substantially the same information that his present independent recollection could provide if functioning, defendant's motion to be adjudged incompetent to stand trial is denied.

At the conclusion of the opinion, Judge McGuire left it open to defense counsel to renew his claim of incompetency if formal discovery and other sources of information did not disclose sufficient facts to enable appellant to receive a fair trial. Appellant renewed his claim of incompetency before trial, but the trial judge, Judge McGarraghy, found appellant competent.

Before the trial, government counsel stated, "I have attempted to give [defense counsel] the fullest disclosure that I could concerning the nature of this case, the facts as they were known to the government . . . . We have turned over, prior to the trial today, a complete description of all the events that occurred as they were known to the Government . . . ." (T.Tr. 6).

STATUTE INVOLVED

Title 24, District of Columbia Code, Section 301, provides in pertinent part:

> (a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order of the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.
>
> (b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such

fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial, unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial.

* * * *

SUMMARY OF ARGUMENT

Appellant, who suffers from no mental disease or defect, was not mentally incompetent to stand trial because he could not remember the circumstances of the robberies charged in the indictment. Lack of memory may be an element of mental competency but it is not incompetency in itself. No court has ever held an accused incompetent solely on the basis of amnesia. An analysis of the medical facts surrounding amnesia and the legal consequences of declaring amnesic defendants incompetent appearing at Note, *Amnesia: A Case Study in the Limits of Particular Justice*, 71 YALE L.J. 109 (1961), shows that appellant's position on this appeal is untenable. The government relies on the analysis in that law review note as well as the following factors: (1) since everyone suffers amnesia to some degree, appellant was no different from many other defendants who stand trial regularly; (2) although in this case appellant's claim of amnesia is genuine, in most cases it is medically impossible to determine whether an amnesia claim is spurious; (3) the definition of incompetency in 24 D.C. Code § 301(a) assumes an accompanying mental disorder; (4) under 24 D.C. Code § 301(b) if an accused with permanent amnesia is mentally incompetent to stand trial, he will necessarily spend the rest of his life in a mental hospital even though he could prove his innocence of the offense; (5) given the practical alter-

natives, the choice dictated by the Constitution is to declare the defendant with amnesia but no mental disorder competent for trial; and (6) there was no unfairness in the circumstances of the instant case.

ARGUMENT

An accused suffering amnesia without any type of mental disorder is not mentally incompetent to stand trial.

(T.Tr. 6, 10-17, 21-24, 29-41, 50, 60-68, 70-75, 78-80; H.Tr. (2) 15-18, 20-28)

The record shows that appellant was in an automobile accident during his flight from the police shortly after the robbery. The accident caused an injury to the brain —specifically, skull fracture, brain concussion, and broken blood vessels—that left him unable to remember anything happening between the afternoon of the robberies and his awakening in the hospital three weeks later. The amnesia is permanent. In all other respects, appellant is mentally normal. He suffers from no mental disease or defect. (Counterstatement, pp. 3-4, *supra*). His amnesia did not render him mentally incompetent to stand trial.

The legal test of competency to stand trial was recently stated by the Court in *Hansford* v. *United States,* as follows: [4]

> According to the Supreme Court, the test of competency
>
> > must be whether [the accused] . . . has sufficient present ability to consult with his lawyer with a reasonable degree of *rational* understanding—and whether he has a *rational* as well as factual understanding of the proceedings against him.

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[4] 124 U.S. App. D.C. 387, 389, 365 F.2d 920, 922 (1966).

> Subsumed under this formulation is the requirement that the defendant's memory and intellectual abilities, which are crucial to the construction and presentation of his defense, must not be substantially impaired by mental disorder. [footnote omitted].

The Court has also observed: [5]

> "[Competency] denotes the intellectual and emotional capacity of the accused to perform the functions which are essential to the fairness and accuracy of criminal proceeding." This includes "present ability to consult with his lawyer with a reasonable degree of rational understanding," *Dusky* v. *United States*, 362 U.S. 402 (1962), and a reasonable ability to understand the proceedings and comprehend the effect of his actions upon them.

Other formulations of the test sometimes include the accused's ability to assist in the defense by revealing the facts and names of witnesses to his counsel.[6]

The question in the instant case is whether under these tests an accused in full possession of his faculties, completely aware of the nature and consequences of the legal proceedings, and able to consult with counsel and participate in his defense is mentally incompetent to stand trial for the single reason that he has no memory of the events surrounding the crime—*i.e.*, he has amnesia without any mental disorder. Under the *Hansford* test, appellant was competent; for there the Court defined incompetency to stand trial as requiring that memory be impaired by "mental disorder." The "mental disorder" requirement was not accidental because a footnote [7] attached to those words in the opinion cites *United States* v. *Sermon, supra*

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[5] *Pouncey* v. *United States*, 121 U.S. App. D.C. 264, 266, 349 F.2d 699, 701 (1965).

[6] See *Lyles* v. *United States*, 103 U.S. App. D.C. 22, 26-27, 254 F.2d 725, 729-730 (1957), *cert. denied*, 356 U.S. 961 (1958); *United States* v. *Sermon*, 228 F.Supp. 972, 978 (W.D. Mo. 1964).

[7] 124 U.S. App. D.C. at 389 n. 5, 365 F.2d at 922 n. 5.

note 6, a case holding competent an accused suffering amnesia.

The case law is in full agreement with the *Hansford* formulation. Some cases hold as a matter of law that amnesia without mental disorder never constitutes incompetency;[8] others hold that in the circumstances of the case the accused's amnesia did not render him incompetent.[9] No case has ever accepted the contention that amnesia without anything more rendered an accused incompetent as a matter of law. Indeed, one authority after making an exhaustive survey of the subject, concluded that "There is no record of any court holding a defendant incompetent to stand trial solely on the basis of amnesia."[10]

The reason why courts have universally rejected appellant's claim is that even though the logic of the claim has a certain plausibility on the surface, an analysis of the factors underlying it virtually commands the result that amnesia is not incompetency as a matter of law. A thoughtful and detailed analysis of the question appears

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[8] *Commonwealth ex rel. Cummins* v. *Price*, 421 Pa. 396, 218 A.2d 758 (1966); *Regina* v. *Podola*, [1960] 1 Q.B. 325 [England].

[9] *United States* v. *Sermon*, *supra* note 6 (accused with amnesia who had consulted fully with counsel before memory loss held competent for trial); *State* v. *Severns*, 184 Kans. 213, 336 P.2d 447 (1959) (amnesia did not render accused incompetent for second trial because transcript of first trial available); *State* v. *Swails*, 223 La. 751, 66 So. 2d 796 (1953) (accused with amnesia competent in certain circumstances); see *United States* v. *Chisholm*, 149 Fed. 284 (C.S.D. Ala. 1906) (jury instructions that amnesia does not in itself constitute incompetency but is a factor relevant to the question. See also the following opinions discussing amnesia: *Youtsey* v. *United States*, 97 Fed. 937 (6th Cir. 1899) (amnesia is a factor for trier of fact to consider in determining competency); *United States* v. *Boylen*, 41 F.Supp. 724 (D. Ore. 1941) (allegation of amnesia entitles accused to competency hearing); and the dissenting opinion of Chief Judge Bazelon in *Hunter* v. *United States*, 119 U.S. App. D.C. 174, 175 n.3, 338 F.2d 283, 284 n.3 (1964) (distinguishing between temporary and permanent amnesia).

[10] Note, *Amnesia: A Case Study in the Limits of Particular Justice*, 71 YALE L.J. 109, 116 (1961).

in an article in the Yale Law Journal, *Amnesia: A Case Study in the Limits of Particular Justice,* which is cited in note 10, *supra.* We could not reproduce or paraphrase the discussion and authorities, both medical and legal, found in that article. Accordingly, we respectfully refer the Court to the article, and we rest our case on the analysis found there as well as the following observations:

(1) Amnesia is a relative concept, for "everyone is amnesic to some degree." [11] Many people stand trial regularly who cannot remember or can only partially remember the events at the time of the offense. There is no difference between amnesia and being intoxicated at the time of the crime, being innocent and asleep in bed instead of at the scene of the crime, or simply being a person with a bad memory. No one has ever suggested that the accused in the narcotics delay case of *Ross* v. *United States,*[12] who alleged no memory of his actions on the day of the narcotics transaction, was incompetent to stand trial.

(2) It is almost impossible for psychiatrists to detect whether an amnesia claim is feigned.[13] To be sure, in the circumstances of the instant case the psychiatrists are reasonably certain that appellant's claim is genuine, but any rule of law formulated in this case would be applied to other cases of amnesia without accompanying mental disorder, and in the vast majority of those cases it would be impossible to verify or disprove the claim. If amnesia is accompanied by a recognized mental disorder, the problem does not arise; for then the psychiatrists are dealing with a disease or defect familiar to them and they can evaluate competency in terms of the total picture of the disease, all of its manifestations including amnesia.

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[11] *Id.* at 111.

[12] 121 U.S. App. D.C. 233, 349 F.2d 210 (1965).

[13] *Id.* at 123-125.

(3) Under our statute, 24 D.C. Code § 301(a), an accused found incompetent is automatically committed to the hospital. Section 301(a) expressly provides that if the accused is found "of unsound mind or mentally incompetent to stand trial, the court *shall* order the accused confined to a hospital for the mentally ill" (emphasis supplied).[14] Under Section 301(b), the accused must remain confined in the hospital until "restored to mental competency." Manifestly, the statute embodies the *Hansford* test of incompetency; for surely the statute did not contemplate committing to a mental hospital people free of mental disorder.

(4) When an accused suffering permanent amnesia unrelated to any mental disorder is committed to the hospital as incompetent to stand trial, he will never regain his freedom even though he is a healthy human being except for permanent inability to remember a few weeks of his life. This is true because Section 301(b) of our statute expressly provides that the accused cannot be released unless he regains his competency or the government dismisses the charges. This is the instant case. Being without mental disorder, there is no medical treatment available to appellant to cure his amnesia. He will never be competent for trial under appellant's definition. Accordingly, under the terms of the statute, appellant will never be able to leave the hospital. Even if he were innocent, or even if he could show he was not guilty of the offense by reason of insanity, he could not waive his incompetency and elect to proceed to trial to establish his

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[14] Since the statute reads in the disjunctive, requiring commitment if the accused is either of "unsound mind *or* mentally incompetent to stand trial," we do not adopt in our brief the view expressed in the opinion of Judge McGuire below (see opinion, p. 5) that an accused with amnesia but no present insanity must be released from custody instead of being committed to the hospital. In one view, the statute plainly states that a finding of incompetency to stand trial, regardless of the accused's present mental condition, triggers mandatory commitment to the hospital.

defense. For the law is clear that an accused cannot waive his mental incompetency.[15]

(5) It might be argued that such a confinement for life would be so fundamentally unfair as to violate due process of law, but such an argument would beg the question. For in the instant situation society must choose one of three possible alternatives—declare the accused competent and put him to trial, release him after his criminal acts into society without any corrective therapy that would tend to rehabilitate him or to deter him in the future, or confine him in a mental institution for life. Since society is faced with a trilema and must choose one of the three, the question is not how fair any one of the three alternatives might be; rather, the question is which of these three is fairer than the other two. And on that question, we respectfully submit, there can be little doubt that the fairest alternative is to put the accused to trial.

(6) There may be some cases in which the circumstances would be so exceptional as to make it less fair to put an amnesic defendant on trial than to confine him in a hospital or to release him. However, this case is not one of them. The evidence of guilt was overwhelming. There was no credible defense available to appellant. Neither mistaken identity nor alibi would have availed him; for the accident occurred in the car stolen from the victim of the first robbery and physical evidence from both robberies (identification papers of the victim of the first robbery and a bottle of deputal from the second robbery) were found in the wreckage. Since government counsel gave the defense complete pre-trial discovery of all the facts in the government's file, appellant had an advantage in preparing his defense shared by few defendants (Counterstatement, p. 5, *supra*). In these circumstances, his trial was not fundamentally unfair.

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[15] *E.g.*, *Pate* v. *Robinson*, 383 U.S. 375, 384 (1966); *Taylor* v. *United States*, 282 F.2d 16, 22-23 (8th Cir. 1960).

CONCLUSION

THEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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